UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 28

COFFMAN SPECIALTIES, INC.
and

Case 28-CA-223779

VICTOR HERNANDEZ, an Individual

COFFMAN SPECIALTIES, INC'S POST-HEARING BRIEF

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JURISDICTIONAL STATUS

Coffman Specialties, Inc. ("CSI" or the "Company") is a corporation engaged in providing heavy construction services. CSI is headquarted in San Diego, California and also has operations in Arizona. The Company acknowledges that it meets the Board's jurisdictional standards as an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the National Labor Relations Act ("the Act").

SUMMARY OF THE ALLEGED UNFAIR LABOR PRACTICES[1]

The Complaint and Notice of Hearing ("Complaint") alleges that that the Company disciplined and discharged the Charging Party, Victor Hernandez ("Hernandez") because he engaged in protected concerted activities under the Act and because of his union activities. The Complaint also alleges that the Company retaliated against Hernandez in order to restrain and coerce employees in the exercise their Section 7 rights and to discourage membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

As demonstrated below, the allegations in the Complaint are without merit. The overwhelming evidence demonstrates that the General Counsel has failed to satisfy his *prima facie* burden in this case. As an initial matter, the uncontroverted facts show that the General Counsel failed to prove that Hernandez engaged in any protected concerted activity.

First, under the *Wright Line* test, the General Counsel failed to show that Hernandez engaged in protected concerted activity. Recently, in *Alstate Maintenance, LLC*, the Board reaffirmed the standards of what constitutes protected concerted activity under the Act that are articulated in *Meyers I and II* and overruled *WorldMark* which conflicted with *Myers Industries*. The Board in *Alstate* made it clear that individual griping, even when done to supervisors and in the presence of other employees, is not automatically concerted activity. Additionally, the Board reaffirmed that an employee's conduct must be "for the purpose of mutual aid or protection" in

[1] The record consists of the Reporter's Transcript of Proceedings ["Tr."], Respondent Exhibits ["R. Ex."] and General Counsel Exhibits ["G.C. Ex."].

order to be protected, even if the conduct is concerted. In this case, the overwhelming evidence shows that Hernandez was simply raising gripes about issues personal to him and that he was not engaged in any activity that was for the purpose of mutual aid or protection of his co-workers. In fact, Hernandez testified at the hearing that he did not discuss with or notify any of his co-workers about his purported protected concerted activity.

The General Counsel also failed to show that CSI harbored any unlawful animus towards the alleged protected activities engaged in by Hernandez, another fatal flaw in the General Counsel's case. The evidence and testimony at the hearing showed that the Company encourages employees to report any and all safety issues and that Hernandez's immediate supervisor was a member of the Teamsters Union himself. .

Second, the General Counsel fails to meet his burden that Hernandez engaged in concerted activity under the *Interboro* doctrine. Cases applying the *Interboro* doctrine involve situations where an individual employee raises an honest and reasonable complaint regarding perceived violations of collectively bargained rights directly with his or her employer. Here, Hernandez could not identify any collective bargaining agreement that *might* conceivably apply to him during his employment with CSI, much less any particular right he was trying to invoke. In response to a question from the Court, Hernandez candidly admitted that he was unaware of the Southern California Master Labor Agreement (the labor agreement that the General Counsel alleges in the Complaint applied to him) and testified that he thought that there was some national contract somewhere that might apply simply based his employment with another employer in a different decades ago. Following Henandez's testimony, the Counsel for the General Counsel moved to amend the Complaint essentially arguing that under *Interboro* it is irrelevant whether a contract actually exists and all that matters for the application of the *Interboro* doctrine is that an employee subjectively believes that a collective bargaining right exists somewhere. The General Counsel's novel theory is not supported by any case law and should be soundly rejected. Indeed, extending the *Interboro* doctrine to cover cases where the

employee does not have to point to the existence of a collective bargaining agreement that he or she was trying to enforce would expand the doctrine past its breaking point.

Third, the General Counsel failed to show that Hernandez engaged in any activity that would be considered "inherently" considered under current Board law. The Board has found that an employee's discussions about wages, work schedules, and job security to be "inherently" concerted. The evidence and testimony at the hearing, however, demonstrates that Hernandez did not complain about any of those issues.

Simply stated, the evidence and testimony on the record does not support the allegations against the Company and the Complaint, therefore, must be dismissed in its entirety.

I. BRIEF SUMMARY OF RELEVANT FACTS

The relevant facts in this case are straightforward and largely undisputed. CSI performs expert heavy construction work for clients in California and Arizona. Among other things the Company does concrete paving on roadway, bridge, runway, and canal projects. Relevant to this matter, CSI has a contract with the State of Arizona to provide construction work on the Connect 202 expansion project in the Phoenix, Arizona area.[2] CSI employs carpenters, laborers, cement masons, and drivers on the Connect 202 project. [Tr. p. 45.] Drivers on the project generally belong to the Teamster's Union, but not necessarily to the same local Union. Drivers working for CSI on the Connect 202 project in Arizona are not covered by any collective bargaining agreement. [Tr. pp. 105-107.]

Because of a shortage of qualified drivers in Arizona to operate Super 10 dump trucks,[3] CSI regularly hires qualified drivers from California to work on the Arizona Connect 202

[2] State Route 202 or Loop 202 is a partial beltway looping around the eastern areas of the Phoenix metropolitan area in central Arizona. It traverses the Eastern end of the city of Phoenix, in addition to the towns of Tempe, Mesa, Chandler, and Gilbert.

[3] A Super 10 truck is a heavy duty dump truck and a driver must have a Class A commercial driver's license to operate the vehicle. [Tr. pp. 107, 166.]

project. [Tr. pp. 107-108.] On occasion, CSI will ask International Brotherhood of Teamsters Union Local 986 (the "Union") to refer qualified drivers in its membership to perform work on projects in Arizona, including the Arizona Connect 202 project. [Tr. p. 78.][4] The Company and the Union are part of a multi-employer Master Labor Agreement that covers certain construction and maintenance work performed by CSI (and other member employers) in Southern California (the "Southern California Master Labor Agreement"). [Jt. Ex. 1.] The Southern California Master Labor Agreement does not cover CSI employees who perform work related to the Arizona Connect 202 project. [Tr. pp.106, 148; Jt. Ex. 1, p. 3.] CSI also uses non-union drivers on its projects in Arizona—including the Arizona Connect 202 project.

In April 2018, CSI's lead foreman on the Arizona Connect 202 project, Larri Nolan, contacted the Union's Business Agent, Jean Brewer, and asked him to recommend qualified Super 10 truck drivers to work on the Arizona 202 project. [Tr. p. 146.] Hernandez was one of two Union drivers Mr. Brewer recommended to Mr. Nolan. [Tr. p. 146.]

In late June 2018, Mr. Nolan contacted Hernandez and offered him work on the Arizona Connect 202 project. The Counsel for the General Counsel ("CGC") did not present any evidence that Mr. Nolan told Hernandez how long his work assignment on the project would last or made any other assurances about the length of his employment with CSI. In fact, Mr. Nolan testified that work on the Arizona Connect 202 project would regularly "go up and down." [Tr. pp. 136-137, 149.] Additionally, Hernandez testified that neither Mr. Nolan nor anyone else from CSI, suggested or told him that he would be covered by any collective bargaining agreement while he worked on the Arizona Connect 202 project. [Tr. pp. 210-211.] Hernandez admitted at the hearing that he had neither seen nor knew of the Southern California Master Labor Agreement prior to the hearing in this matter. [Tr. pp. 211.]

[4] This process is generally referred to as "dispatching." [Tr. p. 78.]

Hernandez's first job assignment on the Arizona Connect 202 project was driving a Super 10 dump truck, along with another CSI employee, David Hernandez (no relationship), from Victorville, California to the Company's job site in Phoenix, Arizona on or about June 23, 2017. [Tr. pp. 168, 200-201.] At the hearing, Hernandez testified that on his first day of work he had concerns that CSI was violating the Federal Motor Carrier Act with respect to drug testing for drivers and the hours of service log books for the Company's Super 10 trucks. [Tr. pp. 202-204.] Hernandez also testified that although he was not satisfied with the "safety paperwork" for the truck he was assigned to drive, he drove the truck to Arizona anyway as a "favor" to Mr. Nolan. [Tr. pp. 204-205.] There is no evidence that Hernandez discussed any of his concerns with David Hernandez or any other of his co-workers. Additionally, Hernandez admitted that he did not complete any safety report to document his concerns or send any messages to the Company at that time indicating the vehicle he was assigned to drive to Arizona was in any way unfit for service. [Tr. p. 205.][5]

On his first assignment, Hernandez worked on the Arizona Connect 202 project for approximately one week. On June 25, 2018, (his first full day on working on the project in Arizona) Hernandez submitted "Driver's Vehicle Inspection Reports" on the two vehicles he drove on the project that day. [R. Ex. 6, pp. CSI0694-95.] In the first report, completed at 6:00 a.m., Hernandez noted that truck # 560 had a left turn signal out and that the "strong arm will not go up." [R. Ex. 6, p. CSI0694.] In his second report, completed at 8:00 p.m., Hernandez noted that truck # 565 had "brakes out of adjustment." [R. Ex. 6, pp. CSI0694-95.] The Company's

[5] Hernandez claims that when he arrived to CSI's job site in Arizona he told Mr. Nolan that there were no "DOT write-up sheets" in the truck and that the "brakes were kind of funny" and the "steering was shaky." [Tr. p. 205.] Mr. Nolan credibly testified that Hernandez never raised those issues with him. Instead of raising his concerns with the Company, Hernandez sent an email to an outside group, CDL Consultants, voicing his concerns about CSI and his former employer. [Tr. pp. 199]. Hernandez did not send a copy of his email to CDL Consultants to CSI or the Union. [Tr. p. 200.]

maintenance employees at the Arizona job-site reviewed and addressed the reports submitted by Hernandez and he operated both trucks without incident on June 25, 2019. [Tr. 303-306.]

Hernandez worked every day during the week of June 25, 2018, except for Wednesday June 27, 2018, when there was no paving work to perform on the Arizona Connect 202 project. CSI offered Hernandez, and all other drivers, to come into work on June 27th to wash their trucks so that they could earn pay. Hernandez, however, declined the Company's offer.

On or about June 30, 2018, Hernandez returned to California with Mr. Nolan and David Hernandez because there was no paving work to be done on the Arizona Connect 202 project that weekend. [Tr. pp. 170,212.] During the drive from Arizona to California, Mr. Nolan discussed the difference in labor issues between California and Arizona with Hernandez. Mr. Nolan testified that he told Hernandez that in Arizona overtime is not paid until an employee works more than 40 hours in a week; unlike California where overtime is paid after 8 hours worked in one day. Mr. Nolan also explained to Hernandez that as an incentive to recruit drivers from California, CSI pays drivers from California who work in Arizona the same wage rate that it pays to drivers in California. Contrary to Hernandez's claims, Mr. Nolan credibly testified that he never told Hernandez that unions had no power in Arizona, that it would be futile to have or that he could not contact the Union to raise any issues. [Tr. pp. 328-329.] Notably, Mr. Nolan is a member of Teamsters Local 166 and testified that he supports the role that unions play in workplace. [Tr. p. 329.]

Hernandez requested the week of July 2, 2018, off and returned to work on the Arizona Connect 202 project on July 8, 2018. There was no paving work to do on the project on July 9 and 10, 2018. Once again, Hernandez declined the opportunity to perform other work offered by the Company on those days and instead remained in his hotel room.[6]

[6] The Company provides hotel rooms at the Phoenix Comfort Inn for all out of state drivers working on its projects in Arizona. CSI pays for the drivers' hotel rooms and no driver, union or non-union, is paid a "per diem" to cover the costs of the hotel room. CSI also assigns two drivers to a room, without regard to union status, whenever possible.

On July 10, 2018, (at 4:56 p.m.) Hernandez sent an email titled "Work" to CSI's Office Manager and Corporate Secretary, Cyndi Sargent, claiming that he was being required to drive unsafe trucks on the Arizona 202 Connect project and that he wanted to be transferred to another location. A few minutes later, Hernandez sent an email titled "Pier dem" to the Union asking how the per diem for "construction Teamsters" working for CSI works and if there was an agreement for out of town drivers. [G.C. Ex. 2, p. 25.] An hour-and-half later, (at 6:27 p.m.) Hernandez sent another email to the Union claiming, among other things, that Union representative Gene Brewer was retaliating against him and that Mr. Nolan was requiring him to drive unsafe vehicles in violation of the "Teamsters agreement" and federal law. [G.C. Ex. 2, p. 26.] Hernandez continued his email campaign and sent the Union another email at 8:05 p.m. asking the Union to represent him because Mr. Nolan would not pay him for days that he did not work on the Arizona Connect 202 project. [G.C. Ex. 2, p. 27.] Hernandez testified at the hearing that he did not share or discuss any of his emails to the Union and the Company with any of his co-workers.

On July 11, 2018, Hernandez's hotel roommate, Ray Para, (a non-union) employee complained to Mr. Nolan that Hernandez had locked him out of their hotel room and that he was concerned about Hernandez's behavior while in their room. Specifically, Mr. Para told Mr. Noland that Hernandez was wielding around a large knife in their hotel room. Later that evening, Mr. Nolan attempted to speak with Hernandez about the matter and, according, Mr. Noland, Hernandez became very agitated and demanding that he should not be required to share a hotel room with a non-union employee. Mr. Nolan testified that Hernandez's behavior was so volatile that his nephew who is a CSI employee, stepped in to attempt to calm Hernandez down. However, Hernandez's anger only intensified. Later that evening, Mr. Nolan spoke with CSI's Safety Manager, Stephen Rodgers, about the situation. Based upon all the circumstances, including the fact that Mr. Nolan had been notified by the Company that he needed to reduce one driver on the Arizona 202 Connect project, he notified Hernandez that he would need to return to

Arizona. The evidence shows that the Company did not terminate Hernandez's employment at that time. Additionally, Hernandez did not request to return to the Arizona project and instead asked the Company for work in California.

II. ANALYSIS

A. Credibility of Witnesses

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx, 516 (D.C. Cir. 2003). "Credibility findings need not be all-or nothing propositions—indeed, nothing is more common in all of kinds of judicial decisions than to believe some, but not all, of a witness' testimony." *Kingman Hospital, Inc*., 363 NLRB 145 (2016) (citing *Shen Automotive Dealership Group*, 321 NLRB at 622.).

In this case, the testimonies of the Company's witnesses are particularly credible and reliable because each provided testimony that was neither embellished nor exaggerated, and each provided foundational and other details that undercut any potential claim of guile, deceit, or exaggeration. Moreover, the Company's supervisors, who were called pursuant to Federal Rule of Evidence 611(c), were highly credible, open, thoughtful and precise. Thus, the testimony from each of them should be fully credited as true and reliable evidence, particularly when in conflict with Hernandez's testimony.

Hernandez's testimony should not be credited, particularly when it conflicts with testimony by the Company's representatives because his testimony was argumentative, self-serving, and heavily directed by the CGC on direct examination. Additionally, on several

occasions Hernandez struggled to provide coherent answers to straight forward questions about a number of key issues.

B. Legal Standards

There is no direct evidence in this case that CSI took any action against Hernandez because he engaged in protected concerted activity. Accordingly, the General Counsel can only prevail on his Section 8(a)(3) allegations of discriminatory discipline by creating an inference of illegal motive under the *Wright Line* test. *Wright Line*, 251 NLRB 1083 (1980).

Under the *Wright Line* analysis the General Counsel must first make a *prima facie* case by showing that "animus toward [the employee's] protected activity was a motivating factor in [an adverse employment] decision" based on the following three factors:

(1) The affected employee engaged in protected activity;

(2) The employer knew of the activity; and

(3) The employer bore animus to the affected employee's protected activity.

Praxair Dist., Inc., 357 NLRB No. 91, slip op. at *1 n.2 (Sept. 21, 2011).

If the General Counsel establishes a *prima facie* case, the employer must then prove that a "legitimate business reason" motivated the action or otherwise demonstrate that the same action would have occurred even in the absence of the protected conduct. *Id.* at 1088; *see also Palms Hotel & Casino*, 344 NLRB 1363, 1363 (2005) (written warning to union supporter was lawful because employer proved that it would have issued warning even in the absence of union activity). If the employer makes that showing, the burden shifts back to the CGC to "show that Respondent's defense is pretextual." *Jordan Marsh Stores Corp.*, 317 NLRB 460, 476 (1995).

1. Hernandez Did Not Engage In Concerted Activity Under the Standard *Wright Line* Test

To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood*

Market, 361 NLRB at slip op. 3. Although these elements are closely related, they are analytically distinct.

As noted above, a respondent violates Section 8(a)(3) if, having knowledge of an employee's protected, concerted activity, it takes adverse employment action motivated by the employee's protected concerted activity. *Lou's Transport*, 361 NLRB No. 158, slip op. at 2 (2014). Although Section 7 does not specifically define concerted activity, the legislative history of Section 7 reveals that Congress considered the concept in terms of "individuals united in terms of a common goal." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984). The question of whether an employee has engaged in concerted activity is a factual one based upon the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005).

Recently, in *Alstate Maintenance, LLC and Trevor Greenidge*, 367 NLRB No. 68 (2019) Board overruled *WorldMark by Wyndham*[7] and reiterated that the governing standards for determining whether an activity is concerted are set forth in the Board's decisions in *Meyers Industries*. In *Meyers I*, the Board held that "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and behalf of the himself." *Myers I*, 268 NLRB at 497. Subsequently, in *Meyers II*, the Board responded to several questions posed by the Court of Appeals for the D.C. Circuit regarding whether the Meyers I definition of concertedness encompasses individual activity. Two of the court's questions, and the Board's responses to those questions, are relevant here.

First, the court asked whether *Meyers I* is consistent with cases in which "concerted activity was found where an individual, not a designated spokesman, brought a group complaint to the attention of management."[8] The Board answered in the affirmative, stating:

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[7] 356 NLRB 765 (2011)

[8] *Myers II*, 281 NLRB at 886.

> *Meyers I* recognizes that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. When the record evidence demonstrates group activities, whether "specifically authorized" in a formal agency sense, or otherwise, we shall find the conduct to be concerted.

The Board reiterated this point in a later passage in *Meyers II*, stating that the *Meyers I* definition of concertedness "encompasses those circumstances where individual employees . . . bring[] truly group complaints to the attention of management." Thus, under *Meyers II*, an individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of "group activities"—e.g., prior or contemporaneous discussion of the concern between or among members of the workforce—warranting a finding that the employee was indeed bringing to management's attention a "truly group complaint," as opposed to a purely personal grievance. Absent such evidence, there is no basis to find that an individual employee who complains to management about a term or condition of employment is acting other than solely by and on behalf of him or herself.

Second, the court asked whether the *Meyers I* standard "would protect an individual's efforts to induce group action."[9] The Board in *Meyers II* answered this question in the affirmative as well, explaining that a single employee's efforts to "induce group action" would be deemed concerted based on "the view of concertedness exemplified by the *Mushroom Transportation* line of cases," which the Board in *Meyers II* "fully embraced." In *Mushroom Transportation Company, Inc. v. NLRB*,[10] the Court of Appeals for the Third Circuit held that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action

[9] *Prill v. NLRB* 755 F.2d 941, 955 (D.C. Cir. 1985)

[10] 330 F.2d 683 (3d Cir. 1964).

in the interest of employees." The court added that "[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'"[11]

In *Alstate Maintenance*, the Board applied the *Meyers Industries* standard and determined that a single employee's statements were not concerted, even though the statements were made to supervisors and in front of other employees. There, a single airport skycap's complained about poor customer tipping habits of a soccer team that was arriving at the airport to his supervisor. Other skycaps overheard the statement and, briefly, refused to attend to the teams luggage. The employer subsequently discharged the skycap at the behest of the airport management.

The ALJ found the employee's statement was not protected concerted activity, ruling:

> This single statement by [the employee] did not call for or request the other skycaps to engage in any type of concerted action or to otherwise make any kind of concerted complaint to their employer about their wages. In my opinion, this was simply an offhand gripe about his belief that French soccer players were poor tippers.

The Board upheld the ALJ's decision and held that "to be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action." In addition, the Board concluded that even if the employee's statement constituted concerted activity, the statement still would not be protected because it was not for the "mutual aid or protection" of the employees. In this regard, the Board agreed with the ALJ that the employee's statement concerned a customer's

[11] Id.

tipping habits as opposed to the wages, hours, or other terms and conditions of employment of the skycaps.

Applying the *Meyers Industries* standard here, the evidence plainly shows that Hernandez did not engage in concerted activity during his brief employment with CSI. The overwhelming evidence shows that all of the activities that Hernandez engaged in were personal gripes that were unique to him and were not intended to induce any group activity. In fact, there is no evidence that Hernandez's co-workers were even aware of his activities. By way of example, Hernandez admitted that he did not raise any issues on behalf of anyone else in his emails to the Union and CSI on July 10, 11, and 12, 2018 nor did he share or discuss those emails with any of his co-workers. [Tr. pp. 231-232.] Similarly, there is no evidence that Hernandez discussed any safety concerns in the workplace with any of his co-workers or that he discussed the per diem issue with any of his co-workers.

2. Hernandez Did Not Engage In Concerted Activity Under the Board's *Interboro* Doctrine

The General Counsel's claims that Hernandez's conduct described in the Complaint is concerted activity under the Board's *Interboro* doctrine is without merit. In *NLRB v. City Disposal Systems Inc*., the Supreme Court approved the Board's *Interboro* doctrine, under which the assertion by an individual employee of a right grounded in a collective-bargaining agreement is concerted activity protected by Section 7 of the Act. 465 U.S. 822, 832-834. Under the doctrine, an employee who honestly and reasonably believes that an employer is acting contrary to the employee's collectively bargained rights is entitled to complain to the employer about such action. The employee's conduct is protected unless the manner in which the employee made the complaint was too far out of line. *City Disposal Systems*, 465 U.S. 822 (1984); *Brunswick Food & Drug*, 284 NLRB 661 (1987).

It is axiomatic, that in order for conduct to be concerted activity that there must be a collectively bargained right in a contract that the employee is trying to invoke. Additionally, the

Board has recently affirmed that not "every action or complaint by an individual employee that purports to enforce a contractual right in fact qualifies as concerted conduct, and the doctrine should not be applied to elevate an employee's purely personal 'griping' to protected status." *PAE Aviation & Tech. Servs. LLC*, 2018 NLRB LEXIS 546, *33 (N.L.R.B. November 9, 2018) (quoting *NLRB v. City Disposal Systems*, 465 U.S. 822, 833 n. 10 (citation omitted)).

As discussed above, Hernandez's conduct in this case was purely personal griping. There is absolutely no evidence that he was attempting to induce any group action. Additionally, Hernandez candidly admitted that he did not know what, if any, collective bargaining agreement applied to his employment with CSI. In response to questioning to the Court, he admitted that he had not seen and did not know about the Southern California Master Labor Agreement during his employment with CSI. Instead, Hernandez testified that he thought that there was some national agreement that might cover his employment based upon his work with another employer decades ago. It simply cannot be said that Hernandez's belief in this regard was either subjectively or objectively reasonable.

3. Hernandez's Activities Were Not Inherently Concerted

The General Counsel also failed to show that any of Hernandez's activities were concerted under the "Inherently Concerted" doctrine. The inherently concerted doctrine holds that discussions by **employees** (plural) or the enlisting of support or action of fellow employees by a single employee with respect to particular subjects are necessarily concerted activity, even without evidence of any intent to engage in concerted action. In order to be concerted activity, an employee's action must not be engaged in "solely by and on behalf of the employee himself." *Meyers Industries*, 281 NLRB 882, 887 (1986). In nearly all, if not every instance, where the doctrine has been applied by the Board, there were discussions by and among employees. E.g., *Boothwyn Fire Company No. 1*, 363 NLRB No. 191, *1, 7 (2016), *Hoodview Vending Co*., 359 NLRB 355, 355, 357-58 (2012); *Aroostook County Regional Ophthalmology*, 317 NLRB 218, 220 (1995); *Automatic Screw Products Co*., 306 NLRB 1072, 1072 (1992); *Trayco*, 297 NLRB

630, 633 (1990); or a single employee enlisting or soliciting the support of fellow employees, *Fresh & Easy Neighborhood Market Inc*., 361 NLRB No. 12, *151, 156 (2014); *Whittaker Corp*., 289 NLRB 933, 933 (1988).

In this case, there is no evidence that Hernandez engaged employees in discussions about his concerns or even attempted to seek their help or assistance to improve working conditions. Accordingly, an argument that the inherently concerted doctrine applies to Hernandez's activities must be rejected.

C. Hernandez's Activities Were Not for the Purpose of Mutual Aid or Protection.

To warrant protection under Section 7 of the Act, activity must be both concerted and undertaken for the purpose of mutual aid or protection. The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment, or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

Based upon the totality of the circumstances, there is simply no evidence that Hernandez was seeking any other employee's assistance to help her address any issue or complaint about the workplace or that she was seeking to improve the terms and conditions of anyone else's employment. Instead, the evidence shows that, at best, Hernandez raised personal gripes unique to his situation. As the Board has repeatedly held, however, an individual employee who expresses personal concerns − as Hernandez did here − does not engage in concerted activity for "mutual aid or protection." *See, e.g., Meyers II*, 281 NLRB at 887.

a. The General Counsel Has No Evidence To Establish The Third Element Of The *Wright Line* Test Because There Is Evidence That The Company Held Any Animus Towards The Conduct Alleged To Be Protected Activity.

There is no evidence that CSI exhibited animus toward any protected concerted activities that Hernandez allegedly engaged in. The evidence shows that the Company regularly hires

Union drivers for its projects and that it encourages employees to report any perceived safety concerns immediately to the Company. In addition, Hernandez's immediate supervisor, Mr. Nolan, is a member of the Teamsters Union and there was no evidence presented at the hearing that the Company has taken any action against employees for raising issues about their terms and conditions of employment.

Simply stated, the overwhelming evidence presented at the hearing established that the Company did not hold any animus towards Hernandez's protected and/or union activity.

b. Even If The General Counsel Had Established A *Prima Facie* Case Under *Wright Line,* CSI Has Proven That Its Actions Toward Hernandez Were Motivated By Legitimate Non-Pretextual Business Reasons.[12]

Even if the General Counsel could establish a prima facie case under *Wright Line*, CSI has articulated legitimate and non-pretextual reasons for its actions with respect to Hernandez's employment. As discussed in detail above, Hernandez was not returned to the project after July 2018 because the Company need for drivers was reduced and because Hernandez clearly stated that he did not want to return to the Arizona 202 Connect project and, instead wanted to work in California.

CONCLUSION

For the foregoing reasons (and based upon all the evidence and testimony presented at the hearing), the General Counsel failed to prove that any of the allegations in the Complaint by a preponderance of the evidence. Accordingly, the Complaint should be dismissed in its entirety.

[12] For the reasons contained herein, the Company also contends that the General Counsel also failed to establish that the Company took any action against Hernandez in violation of Section 8(a)(1) of the Act to discourage employees from engaging in protected and/or union activities or because or because Hernandez joined or engaged in Union activities as alleged in the Complaint. Indeed, the totality of the evidence shows that CSI regularly hires union employees and that it encourages employees to report safety and other work place issues to the Company. There is absolutely no evidence that shows that the Company took any action to chill its employee's right to exercise their rights under the Act.

DATED this 19th day of April 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed and served on this 19th day of April 2019, as follows:

Via E-Filing:

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Administrative Law Judge
National Labor Relations Board
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